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IN THE

Supreme Court of the United States

O&G INDUSTRIES, INC.,

Petitioner,

- against -

NATIONAL RAILROAD PASSENGER CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Should this Court review the Court of Appeals' determination that 49 U.S.C. § 28103(b), which authorizes Respondent National Railroad Passenger Corporation to enter into indemnity contracts that allocate financial responsibility for claims against it, preempts the Connecticut statute that Petitioner argues may nullify its indemnity obligation to Respondent, where the Connecticut statute stands as a substantial obstacle to the full purposes and objectives of Congress as revealed by the text of § 28103(b), the entire legislative scheme and the relevant Senate and House Committee Reports?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent National Railroad Passenger Corporation, a corporation providing intercity passenger rail service, has no parent company. However, American Premiere Underwriters, Inc., and Burlington Northern Santa Fe Railroad Company own 10% or more of Respondent's stock.

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STATEMENT OF THE CASE

Stripped of the numerous issues resolved in protracted proceedings below, what remains of this lawsuit represents the last-ditch effort by Petitioner O&G Industries, Inc. ("O&G") to avoid its contractual indemnity obligations to Respondent National Railroad Passenger Corporation ("Amtrak") under an October 2003 Temporary Permit to Enter Upon Property (the "Agreement"). App. 7. [1]

Both the U.S. District Court for the District of Connecticut (App.48, 62-78) and the U.S. Court of Appeals for the Second Circuit (App. 1, 12-21) carefully reviewed and rejected Petitioner's efforts to repudiate this Agreement by relying upon on a state statute that violated the plain language and the spirit of 49 U.S.C. § 28103(b).[2] App. 21, 75. Petitioner has not cited to a single decision anywhere that conflicts with these lower court determinations.

The contested Agreement, which provided no benefit to Amtrak, allowed Petitioner access to Amtrak's property to perform construction work for the Connecticut Department of Transportation relating to the rebuilding of an interstate highway between New Haven and Branford, Connecticut, in the Northeast Corridor. App. 7, 63-64. Petitioner's work necessarily involved fouling -- that is, obstructing --

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[1] Any reference to "App. __" is to the Appendix to the Petition for A Writ of Certiorari filed by Petitioner herein.

[2] The Second Circuit's Opinion is reported at 537 F.3d 153 (2d Cir. 2008).

Amtrak's active Northeast Corridor tracks at the O&G worksite. *See* App. 6, 7, 49-54, 59.

Under the Agreement, Petitioner undertook to "use all necessary care and precaution to avoid accidents, delay or interference with [Amtrak's] trains or property" and to abide by Amtrak's safety regulations. App. 7. Amtrak agreed to provide certain flag protection and other protection necessary to maintain the "safety and continuity of railroad traffic" over which Amtrak maintained exclusive control. App. 7. However, the provision of protective services would "not relieve [Petitioner] from [its] complete responsibility for the adequacy and safety of [its] operations." App. 7.

As a key element of the consideration Amtrak received in exchange for allowing O&G perform work on Amtrak's property that would necessarily interfere with its rail passenger service operations, O&G agreed, inter alia, that it would defend, indemnify and hold harmless Amtrak "irrespective of [Amtrak's] negligence or fault, from and against any and all losses and liabilities, . . . claims causes of action . . . arising out of or . . . resulting from activities or the work performed by [O&G or] its . . . employees." App. 7-8. This indemnity provision applies, by its unambiguous terms, to two underlying tort claims that were resolved in the proceedings below, claims which stemmed from an injury to and a death suffered by O&G employees while they were performing work on

Amtrak's property pursuant to the parties' Agreement. App.5-6, 17-18, 21.[3]

In its Petition, O&G complains that the U.S. District Court for the District of Connecticut and the U.S. Court of Appeals for the Second Circuit each erred by rejecting Petitioner's attempt to avoid its contractual obligation under the Agreement's indemnity provision based upon Conn. Gen. Stat. §52-572k,[4] which declares void as against public policy agreements in construction contracts to indemnify a party against its own negligence.[5] *See* App. 1-33 (reprinting the Second Circuit's Opinion); App. 34-47 and App. 48-76 (reprinting, respectively, the district court's ruling granting judgment notwithstanding the verdict and its earlier ruling granting summary judgment). As both the district court and the court of appeals found, however, enforcement of the Connecticut statute would violate both the plain language and the spirit of 49 U.S.C. § 28103(b), which

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[3] The district court below found that a third underlying tort claim, involving an injury to an individual who was not employed by O&G, was not covered by the Agreement's indemnification provision.

[4] The Connecticut statute, which only applies to construction contracts, is reprinted at App. 83.

[5] In the Court of Appeals for the Second Circuit, Amtrak contended in the alternative that the Agreement with Petitioner was not a construction contract subject to Conn. Gen. Stat. § 52-572k; the Second Circuit did not, however, address the substance of this argument, finding that it had been waived and was, in any event, of little importance because of the Court's decision on the preemption issue. App. 12-13 and n. 6.

broadly authorizes Amtrak to "enter into contracts that allocate financial responsibility for [any] claims [against Amtrak]." 49 U.S.C. § 28103(b) and (e). *See* App. 16-21, 71-75. The lower courts held that as a result, the Connecticut statute stands as a clear obstacle to the full accomplishment of Congress' objectives in enacting this specific provision as part of the Amtrak Reform and Accountability Act of 1997, Pub. L. No. 105-134, December 2, 1997, 111 Stat., 2570 (the "Amtrak Reform Act"), legislation enacted to alleviate Amtrak's severe financial problems and allow rail passenger transportation providers like Amtrak to enter into enforceable indemnity agreements with other parties that would not be nullified by any state law or policy. *Id.*

As discussed in greater detail below, O&G's Petition rests fitfully on a series of false premises. First, Petitioner professes to find ambiguity in the federal statute at issue. The statute, however, is not ambiguous; it is broad.

Next, Petitioner professes to find a narrow Congressional purpose and intent in the legislative history that somehow justifies O&G's attempt to rely on the Connecticut statute to renege on its contractual indemnity obligation. The applicable Senate and House Committee Reports, however, reinforce the clear and manifest purpose and intent behind the federal statute's broad language and undermines Petitioner's effort to avoid its agreement to indemnify.

Petitioner also suggests that this dispute provides the Supreme Court with the chance to clarify

what O&G characterizes as the confusing and uncertain scope of the Court's implied preemption doctrine. Petition at 33. Petitioner is wrong. The straightforward question here is whether the Connecticut statute stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress in enacting § 28103 (b), resolution of which calls for "a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purposes and intended effects." *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 373 (2000). That is precisely what the Second Circuit Court of Appeals did in its Opinion before arriving at a determination that is fully supported by the relevant federal statute and legislative history.

Finally, Petitioner complains that the Second Circuit's Opinion failed to expressly acknowledge a presumption against federal preemption. But the only real question is whether the Connecticut statute "presents a sufficient obstacle to the full accomplishment of Congress' objectives" under the applicable federal statute. *Crosby*, 530 U.S. at 374, n. 8. Clearly, in this case, it does, fully warranting invocation of federal preemption.

For reasons more fully described in the following section, there is no compelling reason for this Court to grant O&G's Petition. The conclusion reached by the lower courts in this case is consistent with this Court's standards for resolving the conflict preemption issue presented here. Moreover, Petitioner cannot point to any other decisions in the lower courts

addressing this specific federal statute. This case thus presents no split in the circuits and suggest no lower court confusion over the preemptive effect of § 28103(b). Accordingly, this Court should deny the Petition.

REASONS FOR DENYING THE WRIT

Consideration of the Petition begins with the fundamental proposition that Congress has the unquestioned constitutional power to preempt state law under the Supremacy Clause, Art. VI, cl. 2 of the United States Constitution. *See Gibson v. Ogden*, 9 Wheat. 1, 211, 6 L.Ed. 23 (1824). Moreover, this Court has repeatedly and consistently instructed that a state law must yield to a congressional enactment *even without* an express provision for preemption. *Crosby*, 530 U.S. at 372; *United States v. Locke*, 529 U.S. 89, 109-12 (2000); *California v. ARC America Corp.*, 490 U.S. 93, 100-01 (1989); *Hines v. Davidowitz*, 312 U.S. 52, 66-67 (1941).

Thus, this Court "will find preemption where . . . 'under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Crosby*, 530 U.S. at 373, quoting *Hines*, 312 U.S. at 67; *see, e.g., Clean Air Markets Group v. Pataki*, 338 F.3d 82, 87 (2d Cir. 2003); *Bedford Affiliates v. Sills*, 156 F.3d 416, 426-27 (2d Cir. 1998); *see also Cox Cable Advisory Council v. Dep't of Public Utility Control*, 259 Conn. 56, 62-63, 788 A.2d 29, 33 (2002). This, in shorthand terms, is commonly referred to as conflict preemption pursuant to the Supremacy Clause.

There is no confusion or uncertainty about the basic standards for determining whether to invoke conflict preemption under the Supremacy Clause. In *Crosby*, 530 U.S. 363, this Court unanimously held that a Massachusetts law restricting the authority of its agencies to purchase goods or services from companies doing business with Burma was invalid under the Supremacy Clause of the U.S. Constitution owing to its threat of frustrating federal statutory objectives. *Crosby*, 530 U.S. at 366. In the majority opinion by Justice Souter, joined in by six other Justices, the Court clearly articulated applicable standards for analyzing conflict preemption. *Crosby*, 530 U.S. at 372-74.[6]

The Court's task is to examine the federal statute "as a whole" and identify "its purposes and intended effects" and then make a judgment whether the obstacle presented by the state law is a "sufficient obstacle" to require preemption. *Crosby*, 530 U.S. at

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[6] Justice Scalia, in a concurring opinion in which Justice Thomas joined, concurred with the Court's judgment in *Crosby* but took issue with the majority opinion's citation to statements by sponsors of legislation, views expressed by individual legislators, statements of the executive branch and letters to Congressional committees. *Crosby*, 530 U.S. at 388-91 (Scalia, J., concurring). As hereafter discussed, the Second Circuit's conflict preemption finding is supported by the text of § 28103(b), the statutory scheme and the legislative history found in the relevant House and Senate Reports; there is no need to rely on the type of legislative sources with which the concurring opinion in *Crosby* takes issue.

373 and 374, n. 8. The "entire scheme of the statute must of course be considered, and that which needs must be implied is of no less force than that which is expressed." *Id.*, 530 U.S. at 373. If the statute's purpose "'cannot otherwise be accomplished -- if its operation . . . must be frustrated and its provisions be refused their natural effect -- [then] the state law must yield to the regulation of Congress within the sphere of its delegated power.'" *Id.*, 530 U.S. at 373 (*quoting Savage v. Jones*, 225 U.S. 501, 533 (1912), *also quoted in Hines*, 312 U.S. at 67, n. 20).

The state's historic police powers may be superseded by federal statute when that is the clear and manifest purpose of Congress. *Wyeth v. Levine,* -- S. Ct.--, 2009 WL 529172, *5 (U.S. March 4, 2009), (quoted citations omitted). "[T]he purpose of Congress is the ultimate touchstone." *Wyeth,* --S. Ct.--, 2009 WL 529172, at *5; *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 8 (1987).

Measured against these standards, the Second Circuit's finding of conflict preemption does not, by any means, warrant further review by this Court.

The specific federal statute at issue is found in subsection (b) of § 28103, Title 49, United States Code, and, inter alia, reads as follows:

> (b) Contractual obligations. -- A provider of rail passenger transportation may enter into contracts that allocate financial responsibility for claims.

49 U.S.C. § 28103(b). Section 28103(b) was enacted as part of an array of legislative measures contained in the 1997 Amtrak Reform Act, reflecting, *inter alia*, Congress' grave concern over Amtrak's financial condition and its ability to compete effective in the intercity travel market. App. 118-123, 139-144. Section 28103(b) clearly empowers Amtrak to allocate financial responsibility for the underlying claims involved in this dispute by entering into the indemnification arrangement contained in Amtrak's Agreement with O&G.

First, there is no dispute that Amtrak is a "provider of rail passenger transportation" covered by subsection (b) of § 28103.

Second, there is no question that the underlying claims involved in this contractual dispute fall within the category of "claims" that are covered by subsection (b); the term "claims" in subsection (b) is broadly and unambiguously defined in subsection (e)(1)(A) to mean, in this case, "a claim made . . . against Amtrak." 49 U.S.C. § 28103(e)(1)(A).

Third, the Amtrak Agreement with O&G is unquestionably a "contract[ ] that allocate[s] financial responsibility for claims." The Agreement allocates to O&G full contractual responsibility for the two underlying claims arising out of an injury or death to O&G employees, "irrespective of [Amtrak's] negligence or fault . . . ." App. 7-8.

Petitioner argues that the language of § 28103(b) is ambiguous. It is not. Section 28103(b) is, rather, broad and unqualified, with no suggestion that the rail passenger transportation provider's right to "enter into contracts that allocate financial responsibility for claims" is subject to, or may be trumped by, any law or policy that bars an allocation which permits a negligent party to be indemnified. *Cf.,*; *Ngiraingas v. Sanchez,* 495 U.S. 182, 192 (1990) (observing that the Court is "not at liberty to seek ingenious analytical instruments' to avoid giving a congressional enactment the broad scope its language and origins may require")(*quoting United States v. Price,* 383 U.S., 787, 801 (1966) and *District of Columbia v. Carter,* 409 U.S. 418, 432 (1973)); *Altria Group, Inc. v. Good,* 129 S. Ct. 538, 548 (2008) (stressing that the Court's conclusion that a state-law claim was preempted in *American Airlines, Inc. v. Wolens,* 513 U.S. 219 (1995) turned on "the unusual breadth" of a federal statute's preemption provision).

The breadth of § 28103(b) points to one logical conclusion -- Congress intended to authorize providers of rail passenger transportation services, such as Amtrak, to enter into contracts allocating responsibility for claims without regard to any laws that might otherwise impair or nullify such arrangement.

In its effort to support the argument that the broad language of § 28103(b) is ambiguous, O&G contends that Congress meant to do nothing more than "give[ ] Amtrak the authority to enter into

indemnification agreements." Petition at 21. This interpretation is utterly implausible.

In the first place, § 28103(b) does not apply only to Amtrak. It applies, by its terms, to any "provider of rail passenger transportation." It takes a flight of fancy to believe that Congress enacted this provision out of concern that, absent Congress' specific authority, providers of rail passenger transportation may lack authority to enter into indemnity agreements allocating financial responsibility for claims. Moreover, there is not a shred of legislative history to support such an improbable notion

More important, Congress was well aware when § 28103(b) was enacted in December 1997 that Amtrak *already* had *full* authority to enter into indemnity contracts. Amtrak was created in 1971, pursuant to an Act of Congress, the Rail Passenger Service Act of 1970, in order to provide "modern, efficient, intercity rail passenger service." Rail Passenger Service Act of 1970, Pub. L. 91-518, § 101, 84 Stat. 1328; *see Lebron v. National R.R. Pass. Corp.*, 513 U.S. 374, 383-85 (1995). At that time, Congress specifically empowered Amtrak to own, manage, operate and contract for the operation of intercity rail passenger trains. Rail Passenger Service Act of 1970, § 305.

Congress also knew in 1997 that Amtrak had for many years been entering into and relying upon numerous contracts containing indemnification provisions in order to conduct its business. This is demonstrated by H.R. Rep. 105-251, the House

Committee Report underlying § 28103,[7] which specifically references the federal district court's 1988 decision in *National R.R. Pass. Corp. v. Consol. Rail Corp.*, 698 F. Supp. 951, 955-66 (D.D.C. 1988), *vacated on other grounds*, 892 F.2d 1066 (D.C. Cir. 1990). That decision discusses at great length the history behind indemnification contracts negotiated during the 1970's and 1980's between Amtrak and freight railroads over whose tracks Amtrak operate in many parts of the country outside of the Northeast Corridor. *See* App. 129.

Patently, therefore, Congress had no cause whatsoever to enact § 28103(b) in 1997 in order to give Amtrak contractual authority it had possessed and been exercising since its inception decades earlier. Accordingly, Petitioner's argument that § 28103(b) simply represents Congress' intention to give Amtrak authority to enter into indemnification agreements is implausible, if not frivolous.

In addition, both the Amtrak Reform Act, of which § 28103(b) is an integral part, and the legislative history underlying this legislation, provide powerful reinforcement for the conclusion that § 28103(b) was broadly intended to authorize Amtrak, and other rail passenger providers, to enter into indemnity agreements that would not be impaired or nullified by any other law or public policy.

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[7] H.R. Rep 105-251, from the U.S. House of Representatives Committee on Transportation and Infrastructure (Sept. 17, 1997), is reprinted at App. 110-138.

As a threshold matter, the Amtrak Reform Act includes specific findings that "intercity rail passenger service is an essential component of a national intermodal passenger transportation system," that "Amtrak is facing a financial crisis, with growing and substantial debt obligations severely limiting its ability to cover operating costs and jeopardizing its long-term viability," and that "immediate action is required to improve Amtrak's financial condition if Amtrak is to survive." Amtrak Reform Act, Pub. L. 105-134, 111 Stat. 2577, § 2. Similarly, S. Rep. 105-85, the Senate Committee Report underlying § 28103,[8] describes an "urgent need" for immediate action to improve Amtrak's financial condition, which was at a "crisis stage," in order to eliminate Amtrak's dependency on federal operating assistance and provide a series of statutory reforms aimed at reducing Amtrak's costs, increasing Amtrak's efficiencies and revenues, and improving Amtrak's financial condition. App. 141-144.

It is against this backdrop that Congress took a series of legislative measures, one of which was to enact the precise statutory language found in §28103(b). *See* Amtrak Reform Act, Pub. L. 105-134, 111 Stat. 2577, § 161(b). The Senate Report (No. 105-85) specifically explains that:

> this bill clarifies that *indemnification agreements* related to the provision of rail passenger service entered into by

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[8] S. Rep. 105-85, from the U.S. Senate Committee on Commerce, Science and Transportation (Sept. 24, 1997), is reprinted at App. 139-58.

> Amtrak and other parties *would be enforceable.*

App. 148 (emphasis added). The House Committee Report (No. 105-251) is, if anything, even more explicit:

> The bill . . . affirms that indemnity contracts between a passenger rail operator and any other party are fully enforceable without regard to any other law or public policy.

App. 117 (emphasis added). According to the House Committee Report, the "affirmation of the right of owners of rights-of-way and passenger operators to indemnify by contract" was "a crucial feature" of the legislative package. App. 127.

The legislative history thus makes very clear that Congress was explicitly concerned with the need to override state laws that might otherwise nullify indemnity agreements entered into by Amtrak or any other rail passenger transportation provider. The House Committee Report mentions by name the district court's decision in *National R.R. Pass. Corp. v. Consol. Rail Corp.*, 698 F. Supp. 951, which held that an indemnification agreement between Amtrak and freight railroad Conrail violated District of Columbia public policy and was unenforceable because it provided for contractual indemnification for a party's own willful, wanton, reckless or intentional conduct and shifted the burden of paying punitive damages

away from the wrongdoer. App. 124, 129; *see also National R.R. Pass. Corp. v. Consol. Rail Corp.*, 698 F. Supp. at 970-72.

The House Committee Report pointedly observes that "[b]ecause of the court ruling in . . . [the district court action], existing contractual indemnity agreements do not afford a reliable allocation of risk among contracting parties." App. 127. The Report states emphatically that "the public interest is best served through legislation providing that once rail passenger transportation agreements are negotiated, they will be enforced" and, as a result, "the Committee is overruling [the district court] case in order to restore the indemnitees' confidence in the enforceability of their indemnification agreements." App. 129.

The Senate Committee Report does not refer by name to the decision in *National R.R. Pass. Corp. v. Consol. Rail Corp.*, 698 F. Supp. 951, but this Report is equally clear that the purpose of enacting § 28103(b) is to negate any possibility of a state law nullifying indemnity agreements entered into by Amtrak or by other rail passenger providers:

> As long as there is the possibility that state laws can nullify the indemnification contracts [which allocate the cost of liability among the agreement parties], Amtrak and a freight railroad could find themselves litigating against each other or [sic] concerning their obligations to injured

> third parties. Amtrak believes that such litigation inevitably would not only adversely impact its business relationship with its host freight railroad, but it would also lead to significantly higher outlays in settlements and judgments to plaintiffs.

App. 155-156; *see also* App. 148.

In sum, the wording of § 28103(b) broadly, without qualification, authorizes Amtrak to enter into indemnity agreements that allocate financial responsibility for a claim against Amtrak. And the legislative history strongly reinforces Congress' clear purpose and intent -- these agreements are enforceable notwithstanding any law or public policy that one of the contracting parties may later seek to assert to avoid its indemnity obligations.

In the face of the broadly worded statute and the legislative history clearly debunking Petitioner's argument against preemption, O&G would have this Court grant review in order to redraft § 28103(b) in order to suit Petitioner's purposes. Its arguments for doing so are meritless.

First, Petitioner argues that indemnity contracts covered by § 28103(b) should be limited to contracts for the financial allocation of claims concerning just passenger injuries. Petition at 28. This, however, totally ignores the statute's clear wording. Congress specifically defined "claims"

covered by subsection (b) to include *any* claim against Amtrak. 49 U.S.C. § 28103(b) and (e). Congress could have easily defined "claims" covered by subsection (b) to refer, more narrowly, to the passenger claims that are the specific subjects of subsection (a) of § 28103, which sets forth specific monetary and punitive damage limitations on the liability of rail carriers, *inter alia*, for "a claim for personal injury to a passenger [or] death to a passenger . . . ." 49 U.S.C. § 28103(a). Plainly, however, Congress did not do so.

Petitioner is not asking the Court to adopt a plausible interpretation of ambiguous language in subsection (b). Petitioner is instead asking this Court to draft additional limiting language that Congress chose not to include. That, quite obviously, is a task constitutionally delegated to Congress, not to this Court.

Nor does the legislative history support Petitioner's argument. Petitioner does not point to a shred of legislative history indicating that Congress intended to provide for financial allocation of claims only if they involved injuries to passengers. Nor would that limitation make sense in the context of Congress' stated purposes. The Amtrak Reform Act, as previously noted, was enacted to address, *inter alia*, Congress' concern over Amtrak's financial "crisis" (App. 118-123, 140, 141-144), and one of the specific reasons for enacting § 28103(b) was to override state laws that, by nullifying Amtrak's indemnity agreements, would not only "adversely impact [Amtrak's] business relationship," but would also "lead to *significantly higher outlays* in settlements and

judgments to plaintiffs." App. 148 (emphasis added). This being so, there is absolutely no reason why Congress would choose to limit § 28103(b) to claims involving passengers as Congress was obviously aware that Amtrak's operations would require it to enter into indemnity arrangements that covered substantial personal injury claims by not just passengers, but non-passengers as well. *See, e.g., Alcorn v. Union Pac. R. Co*, 50 S.W.3d 226 (Mo. 2001) (Missouri Supreme Court upholds $25 million compensatory damage judgment for passenger in vehicle); *National R.R. Pass. Corp. v. Lexington Ins. Co.*, Civil No. 01-1815, 2003 WL 24045159, at *2 (D.C.C. May 20, 2003) (district court explaining that Amtrak was required to contractually indemnify Union Pacific for Alcorn's accident), *aff'd*, 365 F.3d 1104 (D.C.Cir. 2004); *Beausoleil v. National R.R. Pass. Corp.*, 145 F.Supp.2d 119 (D. Mass. 2001) (woman struck by Amtrak train while crossing tracks at MBTA-owned, Amtrak-operated station); *Justice v. CSX Transp.*, 908 F.2d 119 (7th Cir. 1990) (action on behalf of deceased husband whose truck entered onto CSXT's tracks and was struck by Amtrak's train).

Section 28103(b) clearly does not contain any language limiting indemnity contracts to passenger claims. And to engraft such a limitation onto subsection (b) would undermine the clear Congressional purpose and intent in enacting this provision.

Second, Petitioner argues that § 28103(b) should be limited to contracts for the financial allocation of claims entered into by Amtrak with other

railroads, not contractors like O&G. Petition at 28. Once again, Petitioner asks the Court to ignore the statute's text. Subsection (b) broadly covers *all* contracts entered into by a "provider of rail passenger transportation." 49 U.S.C. §28103(b). Thus, once again, Petitioner is asking this Court not to interpret subsection (b), but to re-write it.

The legislative history undermines, rather than supports, Petitioner's contention. Congress, as noted, was fundamentally concerned about the need to alleviate Amtrak's financial crisis. Congress thus had every reason to provide broadly for enforcement of all indemnification agreements entered into by Amtrak (and other providers) relating to the provision of rail passenger service. Moreover, that, according to the legislative history, is what Congress intended to do.

In addressing the indemnity issue, the House Committee Report states in the broadest possible terms that the bill "affirms that indemnity contracts between a passenger rail operator *and any other party* are fully enforceable without regard to any other law or public policy." App. 117 (emphasis added). The Senate Committee Report similarly states, in broad terms, that the bill makes enforceable "indemnification agreements related to the provision of rail passenger service entered into by Amtrak *and other parties*." (App. 148) (emphasis added).

Congress, to be sure, was motivated by a district court decision involving Amtrak and freight railroad Conrail, and was aware that in much of the country outside the Northeast Corridor Amtrak operates over

tracks owned by freight railroads pursuant to operating agreements that include indemnity arrangements. *See* App. 116, 123-24, 127, 129. As a result, the legislative history emphasizes the need to make sure that indemnification agreements between Amtrak and freight railroads would be enforceable notwithstanding any state law or policy.

But Congress was well aware that "Amtrak is staking the future of the national system on the projected financial success of high-speed rail service in the Northeast Corridor," where Amtrak operates over its own tracks. App. 143; *see also* App. 123, 143--144, 149.[9] Congress thus had good reason to make sure that subsection (b) of § 28103 was *not* limited to indemnification agreements between a rail passenger operator like Amtrak and freight railroads. Rather, it made perfect sense to cover all indemnification agreements between a rail passenger provider such as Amtrak and "any other party." App. 117; *see also* App. 148.

The Agreement allowed Petitioner to enter onto Amtrak's property and foul its high-speed railroad tracks in the Northeast Corridor. Amtrak gained nothing from agreeing to let Petitioner onto its property. Petitioner was not improving Amtrak's property, nor was it enhancing Amtrak's high-speed rail service. On the contrary, there was a risk that Petitioner's work would interfere with Amtrak's rail

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[9] *See, generally*, 49 U.S.C. §§ 24901-24909 (legislation regarding Northeast Corridor Improvement Program); 49 U.S.C. §§ 26101-26105 (legislation regarding High-Speed Rail Assistance).

passenger service operations. Amtrak nonetheless let Petitioner enter onto its property because it knew that its Agreement specifically protected Amtrak from any and all liability or losses due to injuries or death involving Petitioner's on-site workers, irregardless of Amtrak's negligence or fault. The broadly-worded language in § 28103(b) thus served precisely the purpose Congress intended. It assures the enforceability of Amtrak's indemnification arrangement with Petitioner, one which clearly relates to Amtrak's business of providing high-speed rail passenger service in its Northeast Corridor.

Petitioner -- as well as *Amicus* Connecticut Construction Industries Association, a construction industry trade organization of which Petitioner is a member -- claims that the Second Circuit's conflict preemption determination intrudes improperly upon police powers that should be the domain of the states. That is not so.

In the first place, § 28103(b) does not broadly infringe upon the authority of Connecticut or any other state to void indemnity arrangements in construction contracts. It does so *only* with respect to those agreements entered into with a provider of rail passenger transportation services. Moreover, Congress' authority under Commerce Clause to preempt the states' authority on the subject of interstate rail passenger transportation is beyond question. Indeed, it was this Congressional interest that led to the creation of Amtrak in 1971 (*see* Rail Passenger Service Act of 1970, Pub. L. 91-518); and Congress has since made explicit legislative findings

that underscore the strong federal interest in Amtrak's ability to provide "modern, cost-efficient and energy-efficient intercity rail passenger transportation between crowded urban areas and in other areas of the United States;" because of the importance of "[m]odern and efficient commuter rail passenger transportation . . . to the viability and well-being of major urban areas and to the energy conservation and self-sufficiency goals of the United States" 49 U.S.C. §24101(a)(1) and (5). Section 28103(b) represents just one more integral piece of legislation enacted by Congress intended to advance the nurturing of efficient, cost-effective rail passenger transportation service across the country.

In addition, although *Amicus* suggests that § 28103(b) creates safety risks by allowing a rail passenger transportation provider to be indemnified for its own negligence, the relevant legislative history essentially repudiates this contention. The House Committee Report -- in addressing the provisions limiting the provider's liability for passenger claims -- pointedly rejects the contention that its legislation would adversely impact rail safety. App. 126. The House Committee stresses that railroad safety is specifically subject to regulation by the Federal Railroad Administration and cites to numerous Congressional measures enacted to enhance rail safety. App. 126-127. The House Committee's Report concludes that "it is clear that adequate incentives remain in place to ensure the continued safe operation of the nation's rail system." App. 127.

Finally, there is no merit to Petitioner's complaint that the Second Circuit's Opinion fails to

explicitly reference a presumption against preemption. Petition at 34. This critique of the Opinion adds nothing to O&G's argument. The ultimate question is whether, after "examining the federal statute as a whole and identifying its purpose and intended effects," the "state statute presents a sufficient obstacle to the full accomplishment of Congress's objectives under the federal [a]ct to find it preempted." *Crosby*, 530 U.S. at 373 and 374, n. 8. The Second Circuit's Opinion clearly reaches the right result based on an appropriate conflict preemption analysis -- the Connecticut statute presents a substantial obstacle to 49 U.S.C. § 28103(b), requiring the invocation of preemption. *See Crosby*, 530 U.S. *at* 374, n. 8.

Petitioner's position is not advanced by this Court's most recent opinion in *Wyeth*, -- S.Ct. -- 2009 WL 529172. In *Wyeth*, this Court found that the petitioner drug company's conflict preemption argument was based on "an untenable interpretation of congressional intent and an overbroad view of an agency's power to [preempt] state law. *Id,* 2009 WL 529172, at *10. The legislative history, this Court concluded, indicated that Congress did *not* regard state tort litigation as an obstacle to achieving its purposes. *Id.* This Court also stressed that the drug company's preemption argument had to rely upon FDA comments in a preamble to a 2006 FDA regulation that did not merit any deference from the Court. *Id.*, at *11.

Unlike in *Wyeth*, the evidence of Congress' clear and manifest intent to preempt state law in this case is strong. The broad statutory language of § 28103(b),

the overall statutory scheme of the Amtrak Reform Act, and the underlying legislative history in this case all point to the same result. Congress' purpose and objective was to authorize Amtrak and other rail passenger providers to enter into indemnification agreements that would be fully enforceable, notwithstanding any contrary state law or public policy. As a result, the Connecticut statute upon which Petitioner relies presents a substantial "obstacle to the full accomplishment of Congressional objectives." *See Crosby*, 530 U.S. at 374, n. 8.

In summary, Petitioner's contention that 49 U.S.C. § 28103(b) does not preempt the Connecticut statute ignores the broadly-worded text of this federal statute and is antithetical to Congress' clear purposes and objectives. Petitioner's argument, if adopted, would cripple Amtrak's efforts to fully protect itself through indemnification agreements whenever contractors require permission to enter Amtrak's mainline track in order to work on projects, such as the rebuilding of Interstate 95. It would expose Amtrak's indemnification agreements to the vagaries of the laws of every state within Amtrak's Northeast Corridor. Furthermore, as this dispute demonstrates, it would lead to additional costly litigation with Amtrak's contractual indemnitors and the prospect of substantially inflated outlays to third-party claimants. Such an outcome is plainly at odds with Congress' purpose and intent when it enacted § 28103(b) as part of the Amtrak Reform Act. Accordingly, the Second Circuit's Opinion properly relied upon principles of conflict preemption in concluding that the broad

language of 49 U.S.C. § 28103(b) preempts Conn. Gen. Stat. § 52-572k.

CONCLUSION

For all of the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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